

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
AARON SCHOCHET	:	DETERMINATION
	:	DTA NO. 806874
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1982.	:	

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Petitioner, Aaron Schochet, P.O. Box 625, Frederick, Maryland 20701, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982.

On September 14, 1991 and October 8, 1991, respectively, petitioner, appearing pro se, and the Division of Taxation by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel) waived a hearing and agreed to submit this case for determination. All documents and briefs to be submitted by the parties were due by December 30, 1991. The Division of Taxation submitted its documents on October 9, 1991. Petitioner submitted a written argument on November 14, 1991. No brief or written argument was submitted by the Division of Taxation. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is liable for income tax withheld by Brookfield Clothes, Inc. from the wages of its employees if the corporation, which is in bankruptcy, has sufficient funds to pay any unpaid taxes.

II. Whether petitioner was a person required to collect, account for and pay over income tax withheld by Brookfield Clothes, Inc. from the wages of its employees and, if so, whether he willfully failed to do so.

FINDINGS OF FACT

The Division of Taxation issued to petitioner, Aaron Schochet, a Statement of Deficiency dated January 29, 1988 asserting penalties under Tax Law § 685(g) on the basis that he was a person required to collect, truthfully account for and pay over withholding tax imposed under Article 22 of the Tax Law on behalf of Brookfield Clothes, Inc. (hereinafter "Brookfield Clothes"). Penalties were shown as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
6/23/82 - 6/30/82	\$ 8,340.95
1982	40,796.72
9/16/82 - 9/22/82	3,246.25
Total	\$52,383.92

The Division of Taxation issued a Notice of Deficiency also dated January 29, 1988 to petitioner, asserting penalties under Tax Law § 685(g) of \$52,383.92 for the taxable year 1982. The notice referenced the Statement of Deficiency, supra.

A Conciliation Order dated February 10, 1989 reduced the assessment from \$52,383.92 to \$11,511.35 as the result of a printout of Brookfield Clothes' liability (Accounts Receivable System printouts), which showed tax due of \$45,030.36, less payments of \$33,519.01, for a balance due of \$11,511.35.

A Form DO-656, "Preparation of Personal Penalty Assessments - Sec. 685(g) Withholding Deficiency" dated January 14, 1988 lists petitioner as one of three "responsible officers or individuals". It also provides the following "basis for holding [petitioner] as a responsible officer":

"W. T. cancelled check dated 8/4/82 signed by Aaron Schochet."

A letter dated July 13, 1988 of Chester B. Salomon on the letterhead of the New York City law firm of Salomon, Green & Ostrow, P.C. provided as follows:

"Mr. Aaron Schochet, former officer of Brookfield Clothes, Inc., has referred to us certain correspondence relating to an alleged tax claim for the year 1982 against Mr. Schochet deriving from Brookfield Clothes, Inc.

On August 30, 1982 an involuntary chapter 11 petition was filed against Brookfield Clothes, Inc., which formerly did business at 34-02 Queens Boulevard, Long Island City, New York. On September 2, 1982, on consent, an order for relief

under chapter 11 was entered. On September 26, 1986,<sup>1</sup> the undersigned was appointed as chapter 11 trustee....

...If there is a claim against Brookfield, we are certainly interested in that claim inasmuch it may represent a priority claim against the bankrupt estate. Before filing the claim, you should be aware that pursuant to order, dated November 15, 1982, the assets and business of Brookfield were transferred to Jason Gibbs, Inc., now merged into Abraham Zion Corporation. Therefore, it is critical to know the timing and the amounts of the alleged underpayment of withholding tax."

The record on submission herein is extremely bare. Petitioner noted that he was "unable to produce any subsequent substantiation since all books and records of Brookfield Clothes for 1982 were completely destroyed in a fire."

Petitioner's submission consisted of a three-page written argument that includes a statement of facts. Although petitioner's argument noted that facts presented in such argument were made "under penalties of perjury", such facts were not submitted in the form of an affidavit.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that the corporation's withholding tax liability relating to the dishonored check was satisfied by the remittance of a replacement check and that "payroll tax returns and payments...were timely filed and remitted." Petitioner denies any "willful" failure on his part to collect and pay over the corporation's withholding taxes. In his submission, petitioner contends:

"I had made certain that all of the 1982 payroll tax payments for Brookfield Clothes, Inc. were timely and appropriately remitted to the State.... I was particularly careful to make sure all payments were made to ensure the owners of Brookfield Clothes, Inc. would not be held personally liable for any deficiencies."

The Division of Taxation, in its answer, denies that money is available from Brookfield Clothes, Inc., the corporation, to pay the unpaid withholding taxes. The answer also asserts that petitioner was the vice-president of the corporation, signed checks and tax returns and is

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It would seem that the year referenced was a typographical error and should read 1982.

independently liable for the unpaid withholding taxes as a responsible person as defined by Tax Law § 685(n).

### CONCLUSIONS OF LAW

A. Where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, Tax Law § 685(g) imposes on such person "a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." Tax Law § 685(n) defines "person", for purposes of Tax Law § 685(g), to include:

"an individual, corporation or partnership or an officer or employee of any corporation...who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

B. The so-called "responsible officer's" liability under Tax Law § 685(g) is separate and independent from the corporation's liability. In Matter of Kadish (Tax Appeals Tribunal, November 15, 1990), the Tribunal noted as follows:

"Clearly, the general rule is that the liability of a responsible officer is separate and independent from that of the corporation (see, Matter of Yellin v. New York State Tax Commn., 81 AD2d 196, 440 NYS2d 382). However, this is not to say that the proceedings in bankruptcy will never affect the amount of the liability of a responsible officer for payment of taxes (see, Matter of Trachtenberg v. New York State Tax Commn., 107 AD2d 57, 485 NYS2d 621).

Thus, if the bankruptcy proceeding results in a decrease of the corporation's liability, or in the payment by the corporation of all or a part of the asserted deficiency, such decrease or payment will result in a decrease of petitioner's outstanding liability (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, 694, affd 138 AD2d 915, 526 NYS2d 660, lv denied, appeal dismissed 72 NY2d 938, 532 NYS2d 845; Matter of Trachtenberg v. State Tax Commn., supra; Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990). The record here, both at hearing and on this exception, does not indicate the final disposition, if any, of the corporation's liability in the bankruptcy proceeding so that there is no basis in the record to determine if that disposition in any way affects petitioner's liability."

C. In the matter at hand, although petitioner asserts that the trustee in bankruptcy for Brookfield Clothes, Inc. has adequate resources to satisfy any outstanding withholding tax liabilities, the record herein does not indicate whether the Division of Taxation has sought to satisfy any outstanding withholding tax liabilities by pursuing the bankrupt corporation. Rather, the Division of Taxation denies that the corporation has the resources to pay the unpaid

withholding taxes. Consequently, petitioner's liability remains unaffected by the corporation's bankruptcy proceeding.

D. The Notice of Deficiency dated January 29, 1988, as described in Finding of Fact "2", supra, which referenced the Statement of Deficiency also dated January 29, 1988, as described in Finding of Fact "1", supra, provided petitioner with sufficient information for him to prepare his case. Therefore, the Notice of Deficiency raised a presumption of correctness that placed the burden of proof on petitioner (see, Tavolacci v. State Tax Commission, 77 AD2d 759, 431 NYS2d 174; Matter of Schneier, Tax Appeals Tribunal, November 9, 1989; Matter of Matson, Tax Appeals Tribunal, March 10, 1988).

E. As noted in Finding of Fact "7", supra, the record on submission is extremely bare. In short, petitioner must bear the consequences of his failure to introduce adequate proof concerning his alleged lack of willfulness in collecting and remitting withholding taxes.

Whether an individual was a person required to collect, truthfully account for and pay over withholding taxes during any given period and whether he willfully failed to do so are questions of fact (see, Matter of MacLean v. State Tax Commission, 69 AD2d 951, 415 NYS2d 492, affd 49 NY2d 920, 428 NYS2d 675; Matter of Rounick, Tax Appeals Tribunal, October 17, 1991).

Petitioner's statements in his written argument provide an insufficient basis to resolve such questions of fact in petitioner's favor.

F. In addition, petitioner failed to prove that "payroll tax returns and payments... were timely filed and remitted" as he alleged. In particular, no evidence of any replacement check was introduced.

G. The petition of Aaron Schochet is denied, and the Notice of Deficiency dated January 29, 1988 is sustained, as modified by the conciliation order dated February 10, 1989.

DATED: Troy, New York  
June 4, 1992

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE